manufacturers to systems integrators, apparently hoping that the Commission will believe these diverse entities represent special access competitors.

The data that the RBOCs rely upon from the *UNE Fact Report* grossly misrepresents the actual extent of CLEC loop/transport self-deployment and exaggerates the actual presence of price constraining special access competition.

12. The RBOCs' *UNE Fact Report* seeks to portray extensive deployment of CLEC facilities in areas where, it contends, customer demand is greatest. CLECs, the *Fact Report* argues, can serve and are serving a large number of enterprise customers using their own facilities, fixed wireless services and cable television facilities, and where none of these are available "competitors can readily use the ILEC's tariffed special-access services to fill out any remaining gaps in their coverage."[13] In fact, the *UNE Fact Report*'s own data, together with sworn testimony by a number of CLEC executives and network engineers that were also filed in the *Triennial Review Remand* proceeding, paint an entirely different picture. Describing those portions of the overall enterprise market where CLECs require the use of RBOC network facilities merely as "remaining gaps in their coverage" would be like describing the Pacific Ocean as a "gap" between San Francisco and Tokyo. In fact, these "gaps" in CLECs' coverage constitute the vast, overwhelming majority of all enterprise customer locations nationwide.

13. *Id.*, at III-2.

13. Moreover, in the instant case, since the *UNE Fact Report* data is being relied upon as evidence to demonstrate competitive alternatives available to compete *with special access services*, the ability of those same special access services to "fill out any remaining gaps" is nil. If CLEC facilities are not available to compete with special access, there is nothing to constrain ILEC pricing of those services.

14. As has been the case with the various submissions made by the RBOCs in this and the *Triennial Review Remand* proceeding, the *UNE Fact Report* fails to draw any distinctions among the various segments of the overall enterprise market, distinctions that materially affect CLECs' ability to provide competing services using either their own or other non-ILEC facilities, and correspondingly the ability of those CLECs to discipline the RBOCs. Even taking the *Fact Report*'s data on CLEC facilities deployment at face value for purposes of discussion, CLECs have deployed facilities at less than 31,669 enterprise customer locations, i.e., at *less than one percent of all commercial buildings nationwide.*

15. Not even mentioned in the *UNE Fact Report* is the *fact* that virtually all of the customer sites at which CLEC facilities have been deployed involve services at the OCn level. Nowhere does the *Fact Report* provide *any evidence* of CLEC loop facilities being constructed at locations where the customer's requirement is at the DS-1 level – or even as much as two DS-3s. In the *TRO*, the Commission determined that CLECs *have not deployed their own facilities to any*

measurable degree where the customer demand is less than three DS-3s.[14] Significantly, *no facts in the UNE Fact Report refute or, for that matter, even address this critically important finding.* Apparently, the RBOCs are hoping that if they fail to distinguish between the DSn and OCn segments, the Commission will simply *infer* from the highly limited CLEC presence at the very high end of the enterprise market that the *entire enterprise market* confronts precisely the same level of facilities-based competition. And, indeed, such an inference is just what the RBOCs would require, since there are decidedly no "facts" anywhere in the *Fact Report* that would actually and directly support such a conclusion.

16. The *UNE Fact Report* contains such gross misrepresentations and unreliable data with respect to CLEC high capacity networks that are represented in this proceeding as constraining special access pricing that it can only provide a highly distorted picture of actual CLEC facilities deployment and business presence. First, with respect to competition for high-capacity facilities and services, the *Fact Report* contains no data at all on the specific availability of competing CLEC facilities for either high capacity transport or high capacity loops. Instead, the *Fact Report* chooses to present "data" (discussed below) on "CLEC Networks" followed by

14. *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96- 989; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC No. 03-36, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), 18 FCC Rcd 17155, at para. 298.

unsupported *assertions* that the existence of CLEC networks fully satisfies a competing carrier's need for both high-capacity transport and high capacity loops.

17. This "evidence" of competitive fiber networks is a hodgepodge of quotes, misused CLEC data, and generalizations that teach nothing about the actual state of competition for high capacity services. For example, the *UNE Fact Report* begins its description of competitive networks by citing the *TRO* as stating that the Commission had found that competitive fiber was available in large and small markets throughout the country.[15] In fact, the Commission in the *TRO* made no such finding. It devoted significant time and effort to delineate proper geographic and capacity level product markets that identified specifically those limited instances where CLECs were not impaired without access to UNEs. The *Fact Report*'s statement obscures all these considered distinctions, which are only identifiable through a close examination of the *Fact Report*'s footnotes, where the *Fact Report* cites several *TRO* findings to the effect that, in "some areas" and at some capacity levels, CLECs have deployed their own fiber. The *UNE Fact Report*'s attempt to attribute an overarching statement regarding the ubiquity of competitive fiber to these location- and capacity-specific Commission statements is both disingenuous and misleading.

18. Tables 7 and 8 of the *UNE Fact Report* purport to show "High-Capacity Service offerings over Competitive Fiber" and that "CLECs Use Their Networks to Provide *Local*

15. *UNE Fact Report*, at III-3

Services." Both of these tables, however, consist of nothing but marketing statements from CLECs regarding service availability, and generally make no claims regarding the exclusive use of the CLEC's own self-deployed fiber. In fact, CLECs often use the term "on-net" or otherwise characterize facilities as being on "their network" when describing *either* owned or leased facilities. There is no reason to assume that *any* of the carriers cited in Tables 7 or 8 are referring to services generally available to customers served entirely and exclusively over the CLECs' own wholly owned facilities.

19. CLECs filing comments in the *Triennial Review Remand* proceeding confirmed the fact of severely limited non-ILEC wholesale availability of loop facilities. XO Communications director of Transport Architecture explained that

> Because of limited building presence from other CLECs, we rarely have been able to purchase DS-1 and DS-3 loop facilities from other CLECs. This is true of all of our markets across the nation. Indeed, we found that CLECs offer DS-1 and DS-3 loops on a wholesale basis to *fewer than 5 percent* of the buildings that XO serves.[16]

Similarly, Xspedius stated that it "rarely would be able to purchase DS-1 loop facilities from other CLECs. This is true of all of our markets across the nation."[17] Eschelon Declarant Kunde explains that

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16. Declaration of Wil Tirado on Behalf of XO Communications, Inc., WC Docket 04-313, October 1, 2004 ("*Tirado (XO)*"), at para. 21, emphasis in original.

17. Declaration of James C. Falvey on Behalf of Xspedius Communications, LLC, WC Docket 04-313, October 1, 2004 ("*Falvey (Xspedius)*"), at para 26.

> If self-provisioning and acquiring high-capacity network elements from third-party providers were realistic alternatives to ordering them from ILECs, CLECs would have little reason to order them from ILECs. CLECs, such as Eschelon, continue to require access to Qwest's unbundled high-capacity loops, however, because self-provisioned and third-party provided high-capacity loops are not available to serve the vast majority of our customers. Relatively few of Eschelon's customers are located in big downtown office buildings that may be 'lit' by competitive facilities.[18]

20. It is possible to contrast this sworn CLEC evidence with the assertions made in the *UNE Fact Report* regarding the claimed availability of wholesale services. Table 9 in the *Fact Report* purports to provide a list of high-capacity wholesale services offered by competitive fiber carriers. In every case, the sources for the carriers' "wholesale" offerings are statements made on their respective websites or in the carriers' marketing materials. These sources lack specificity, and provide no details as to the precise type, location or price of the services that the *Fact Report* alleges are being offered. Without such specifics, it is not possible to verify the actual extent and viability of these "wholesale offerings." Indeed, from the "facts" presented in Table 9, it is impossible to determine if all of the carriers listed provide wholesale services *to even one CLEC*. In at least one case, a carrier cited by the *Fact Report* as providing wholesale services – KMC – presented sworn testimony in WC 04-313 that it is not equipped to provide such services.[19]

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18. Declaration of David A. Kunde on Behalf of Eschelon Telecom, Inc., WC Docket 04-313, October 1, 2004 ("*Kunde (Eschelon)*"), at para. 16. Similar statements are contained in the Declarations of all CLEC Coalition witnesses (See fn. 44, *infra*.)

19. Declaration of Mike Duke on behalf of KMC Telecom Holdings, Inc., WC Docket 04-313, October 1, 2004 ("*Duke (KMC)*").

Even where these carriers *do* provide limited wholesale services, the fiber networks owned and operated by these CLECs are inadequate to establish the actual availability of competitive wholesale facilities where required by CLECs. For example, QSI Consulting, Inc. had examined ILEC claims as to the presence of trigger-satisfying wholesale providers against specific evidence introduced in state *TRO* proceedings.[20] According to QSI, ILECs had *claimed* that dark fiber was available at 954 locations, whereas the evidence put that figure at zero. QSI also noted ILEC claims of DS-3 and DS-1 wholesale availability at 719 and 724 locations, respectively, whereas its examination identified only 49 DS-3 and 36 DS-1 locations. Finally, whereas the *Fact Report*'s Table 9 purports to identify some 32 CLECs as providing wholesale services, QSI had advised me that in eighteen state proceedings that it had reviewed, fully seventeen of the companies listed in the *UNE Fact Report*'s Table 9 had not been specifically identified by the petitioning ILECs as satisfying any wholesale triggers.[21] Note that at that time the separate existence of AT&T and MCI would have been included into any "trigger" count; with both now out of the CLEC column, the instances where triggers have been satisfied is undoubtedly less than it had been last fall.

21. Claims advanced in the *UNE Fact Report* with respect to fixed wireless present speculations as facts regarding the ability of fixed wireless operators to expand the geographic

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20. *Selwyn TRR Declaration,* at paras. 45-62.

21. The carriers not identified were Lightpath, Cavalier, TelCove, Comcast, SIGECOM, ChoiceOne, American Fiber Systems, City Signal, LightCore, Northeast Optic, OnFiber, ConEd Communications, PPL, El Paso, Lafayette, Southern Telecom, and AGL.

scope of high-capacity networks. At present fixed wireless technology faces significant hurdles in attracting and serving enterprise customers. But now the *Fact Report* notes that "[t]he fixed wireless industry was not doing well at the time the *Order* was issued, but it has been dramatically revived since."[22] The "dramatic revival" to which the *Fact Report* refers is the IEEE industry standard (802.16a), which was recently finalized. However, as the *Fact Report* notes only in a footnote, "[i]nitial vendor tests are scheduled for the third quarter of 2004, and certified equipment is expected in the market by the first half of 2005."[23] With the exception of WilTel, every carrier identified in Table 15 of the *Fact Report*, "CLEC Use of Fixed Wireless to Extend Fiber Networks," and now incorporated into Appendix C of the *Lew Declaration* in this proceeding, is described as "checking out," "looking at," "looking for," "working with," or "in trials" to use fixed wireless, with statements couched in terms such as "could be a very meaningful breakthrough possibility."[24] The new "WiMax" standard is still in its infancy and, as previous excitement over earlier versions of fixed wireless service have shown, technologies rarely live up to their hype. Indeed, this is confirmed by testimony submitted by XO, which is, or more accurately intends to be, in the fixed wireless business. XO states that it has

> ... invested nearly $1 billion in acquiring LMDS spectrum at the 28, 31 and 39 GHz frequencies, which in combination potentially covers 95 percent of the population of the 30 largest U.S. cities. We made this investment in the hope and expectation that we eventually will be able to use fixed wireless technology as a local loop

22. *UNE Fact Report*, at III-20.

23. *Id.*, at III-20, fn. 52.

24. *Id.*, at Table 15, and *Lew Declaration (Verizon)* at Appendix C.

> substitute... Despite our best efforts, the roll-out was a failure... The results of our testing show that... at some indeterminate future point, wireless loops likely will be able to function as substitute for more than 5 DS-1s or DS-3 local loops in some situations. However, it is very clear that widespread commercial deployment of wireless local loops will not occur in the near future. In addition, when it does happen, the wireless local loops solution will only be useful in isolated situations that are conductive to use of the technology.[25]

The Commission can hardly base a finding of price constraining competition in the special access market on a technology that even substantial investors admit is not yet a viable commercial option, and indeed will never be suitable for large portions of the enterprise market.

22. Statements such as those cited above from XO belie the claims made in the *UNE Fact Report* regarding the extent of fixed wireless use. Table 13 claims that 40% of enterprise businesses, 29% of mid-sized business, and 23% of small businesses report using fixed wireless.[26] However, the *Fact Report* provides no indication of the *extent* to which these companies use fixed wireless – which use is, in all likelihood, extremely limited – or, for that matter, what precisely would constitute "use" of "fixed wireless." For example, does use of a wireless local area network ("LAN") driven by a wireless router than can be purchased for less than $100, constitute "use of fixed wireless?" Is Starbucks counted as a "user" of fixed wireless because it provides wireless "hot spots" in its stores that provide Internet access to Starbucks customers, with the connection between the individual store and the host ISP being accomplished

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25. *Tirado (XO)*, WC Docket No. 04-313, at paras. 23-35.

26. *UNE Fact Report*, at Table 13.

using *wireline* facilities? Indeed, the small number of providers cited, and the limited scope of their service offerings (e.g. most of the fixed wireless providers cited in Table 14 provide service in one or two smaller cities), make it highly unlikely that 40% of large enterprise have adopted fixed wireless in any significant way.[27]

Loops

23. With respect to competition for high-capacity facilities and services, the *UNE Fact Report* contains no data at all on the availability of competing CLEC facilities for either high capacity transport (special access interoffice facilities) or high capacity loops (special access local channels). Instead, the *Fact Report* chooses to present "data" (discussed below) on "CLEC Networks" followed by unsupported *assertions* that the existence of CLEC networks satisfies a competing carrier's need for both high-capacity transport and high capacity loops. By presenting only highly aggregated data that does not even recognize *any* capacity-based distinctions, that does not differentiate between fiber deployed for customer premises connections (loops) vs. transport, or in some cases that does not even distinguish between "local" and "interexchange" fiber, the *Fact Report* does not even address, let alone contribute any "facts" to support, the kind of specific impairment analysis that the Commission has determined to be necessary.

24. Loop facilities represent a sunk cost to a CLEC that is largely or entirely unrecoverable through any other means if the customer ceases taking service from the CLEC, except in the

27. *Id.*, at Table 14.

unlikely event that a new customer demands service at the same location. Finally, the effect of the RBOCs' first mover advantage with respect to preferential access to buildings, access to rights-of-way, higher risk of new entrant failure, substantial sunk capacity, operational difficulties, and marketing and brand preferences, are all more pronounced with respect to specific local loop routes than with transport facilities.

25. Sworn testimony offered by various CLEC executives and network engineers, of course, have put a lie to the *UNE Fact Report*'s undocumented speculations.[28]

26. CLECs often found it prohibitively expensive to connect buildings to their networks, even where they had fiber "lying within easy reach" of the specific location in question. Yet the *UNE Fact Report*'s figures for CLEC route miles of fiber and building connections presented out-of-context marketing and press material that rarely provided the information that is described in the *Fact Report* document, and as such cannot be relied upon as "fact" to provide a reasonable picture of CLEC network capabilities. For example, Table 2, Section III of the *Fact Report* purports to show the facilities available from "Fiber Wholesalers" including the MSAs served,

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28. See generally in record in WC Docket No. 04-313, *Tirado (XO)*; *Duke (KMC); Falveny (Xspedius)*; *Kunde (Eschelon)*; Declaration of Rebecca H. Sommi on Behalf of Broadview Networks, Inc., WC Docket No. 04-313, October 1, 2004 ("*Sommi (Broadview)*"); Declaration of Warren Brasselle on Behalf of Talk America Inc., WC Docket No. 04-313, October 1, 2004 ("*Brasselle (Talk America)*"); Declaration of Anthony Abate on Behalf of SNiP LiNK, LLC, WC Docket No. 04-313, October 1, 2004 ("*Abate (SNiP LiNK*"); Declaration of Dan J. Wigger on Behalf of Advanced Telecom, Inc., WC Docket No. 04-313, October 1, 2004 ("*Wigger (Advanced)*").

network miles and buildings connected directly with competitive fiber. An examination of the source documentation cited as the basis for the preparation of this table, however, uncovers numerous examples of misleading use of company statements. For example:

- AboveNet stated that it had 1.4 million metro fiber miles, which provides no information on actual route miles. Also, AboveNet's 1.4 million metro fiber miles were in major US markets as well as in London, England. An inspection of network maps for AboveNet's US vs. London markets indicates that a very significant portion of this fiber was *not* deployed in the US at all.[29]

- LightCore was a wholly owned subsidiary of CenturyTel – an ILEC – and apparently owned fiber facilities in CenturyTel's ILEC operating areas as well as areas in which the company operated as a CLEC.[30]

29. AboveNet Website, AboveNet Products and Services Resources, IP and Fiber Maps, http://www.above.net/products/maps.html (accessed October 15, 2004).

30. CenturyTel Website, Company Profile, Service Areas, http://www.centurytel.com/about/companyProfile/index.cfm (accessed October 15, 2004); LightCore Website, Network Map, http://www.lightcore.net/network_nm.php (accessed October 15, 2004).

- NEESCom/Gridcom stated that it "passes" 177 buildings, not that it had directly connected the buildings to its network.[31]

- Northeast Optic Network (NEON) indicated that, despite its metro fiber ring network, it does not usually provide local loops. NEON indicated that it

> can assist customers in three ways with the Local Loop: We will source it, buy it, and re-sell it to customers; Customers can source and buy it themselves and NEON will connect them; NEON will work with building managers or other real estate professionals to provide custom builds at specific, larger locations. NEON will consider providing Local Loop on an individual, case-by-case basis. Some of the criteria we assess include: how far is the customer's location off-network?; how much capacity is required?; and what are the customer's needs?[32]

- The NEON "Building List 2004" cited in Appendix H of the *UNE Fact Report* as a basis for its figure of 177 NEON "lit" buildings actually contains a list of NEON network facility locations, such as BOC Central Offices, and Common Carrier Access points and Nodes, both "planned" and "existing" – *none of these buildings are end user customer locations* – and, as noted above, NEON states that it does not provide end-user loop connectivity.[33]

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31. NEES Metro Rings Website, http://www.gridcom.com/neescom/prod_servc/metro/index.htm (accessed October 15, 2004).

32. NEON Website, Frequently Asked Questions, http://www.neoninc.com/ (accessed October 15, 2004).

33. NEON Communications Building List 2004, http://www.neoninc.com/ (Link accessible (continued...)

- The *UNE Fact Report* claimed that OnFiber is providing service at 1,000 on-net buildings. However, OnFiber stated that "the OnFiber network currently reaches or passes almost 1,000 commercial buildings and Points of Presence (POPs)."[34] "Passes" does not ordinarily mean "connected," and it is not at all clear as to what "reaches" meant. However, it would appear, at the very least, that the "facts" reported in the "Fact Report" are less than accurate.

27. The speculation and assumptions behind the "Network Miles" figures included in Tables 1, 2 and 3 of the *UNE Fact Report* fail to properly isolate local fiber miles. NEESCom/Gridcom, a "Fiber Wholesaler," states that its route miles are a combination of local and regional miles, consisting of both "regional backbone and expanding family of metro rings."[35] Progress Telecom, one of the utilities that the *Fact Report* identifies as a wholesale provider of local fiber, is cited as having 8,524 network miles. In fact, this network consists significantly of long haul

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33. (...continued)
from "Frequently Asked Questions" section of webpage, accessed October 15, 2004). Note that this building list indicates 145 existing buildings and 37 planned buildings.

34. OnFiber Press Release, *OnFiber Achieves Triple Digit Revenue Growth for Second Consecutive Year*, February 9, 2004, Available at, http://www.onfiber.com/interior.asp?section=press&page=press_release&release=pr040209 (accessed October 25, 2004).

35. NEESCom Website, "The NEESCom Edge," http://www.gridcom.com/neescom/edge/index.htm (accessed October 15, 2004).

fiber assets stretching from New York to Miami.[36] The *Fact Report* indicates that AGL Networks "installs more than 50,000 laterals and 750 miles of conduit per year."[37] In fact, since AGL only reports 235 route miles of fiber *altogether*, it seems rather unlikely that AGL Networks installs anywhere near 750 fiber route miles annually. AGL notes that "AGL Resources" *not* "AGL Networks" installs these laterals and conduit miles. AGL Resources is the parent company of AGL Networks, but also the parent of Atlanta Gas Light, Chattanooga Gas, Virginia Natural Gas, Georgia Natural Gas and Sequent Energy Management.[38] Despite the claims of the *Fact Report*, it is reasonable to assume that the vast majority of laterals and conduit laid by AGL does not include fiber, but rather is gas infrastructure. Likewise, Con Edison Communications and PPL Telcom note merely that their networks pass "within 2 city blocks" or "within a half mile" of the business location figures cited.[39] Finally, FPL FiberNet, far from having a network that, "reaches '2.2 million business lines in the state' of Florida" actually claims that its network, "crosses the service territories of the three major local telephone

36. Progress Telecom Network Map, Progress Telecom Website, http://www.progresstelecom.com/pdf/Network%20Map.pdf (accessed October 15, 2004).

37. *UNE Fact Report*, at Table 3.

38. AGL Networks Website, Corporate Organization, http://www.aglnetworks.com/content/company/agln_ourcom_cororg.html?onImage=0&onImage=8 (accessed October 15, 2004).

39. *UNE Fact Report*, at Table 3.

companies in Florida, ultimately reaching 2.2 million business lines in the state" clearly *not* implying that it is already connected to all 2.2 million business lines in Florida.[40]

Transport

28. The *UNE Fact Report* asserts that "competitive entrance facilities are available, at a minimum, in every wire center where one or more competing carriers has collocated fiber-based transmission equipment."[41] The *Fact Report*'s authors cite the *Pricing Flexibility Order* to substantiate this claim, arguing that it holds that "fiber-based collocation provides strong indication of competitive entrance facility deployment."[42] But the *FACT Report* conveniently ignores the Commission's finding at para. 397 of the *TRO* that the mere existence of competitive entrance facilities is not evidence of non-impairment with respect to unbundled transport. There, the Commission found that identification of only one fiber-based collocation arrangement in a wire center was not sufficient for a finding of non-impairment. The Commission required that,

40. *Id.*, at Table 3; Press Release, *FPL FiberNet, FPL FiberNet announces service availability in St. Petersburg metro*, September 24, 2001, available at: http://www.fplfibernet.com/news/contents/01126.shtml (accessed October 15, 2004).

41. *Id.*, at III-27.

42. *Id.*, at fn. 79, citing *Access Charge Reform,* CC Docket No. 96-262; *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1; *Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers*, CCB/CPD File No. 98-63; *Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket No. 98-157; *Fifth Report and Order and Further Notice of Proposed Rulemaking*, FCC No. 99-206, 14 FCC Rcd 14221 (1999) ("*Pricing Flexibility Order*"), 14 FCC Rcd 14265, at para 81 (1999).

based upon a simple headcount of collocation, BOCs were required to show competitive facilities from three different CLECs. As the Commission explained

> 407. We set the number of competitive facilities at three for several reasons. First, we want to be assured that the route can support "multiple, competitive" transport networks. Second, setting the trigger at three competitive facilities allows for the possibility that some network owners may not be interested in providing wholesale services, in contrast with the wholesale availability trigger which counts only actual wholesalers. Third, due to the sunk nature of transmission facilities, facilities will remain on a route even if a competitive transport provider exits the market. Furthermore, we note that where, through the application of this trigger, impairment for unbundled transport at a particular capacity is no longer found, substantial competitive transport facilities, and perhaps other capacities of UNE transport will be available. Therefore, if this trigger removes unbundled transport at a particular capacity level, carriers will remain capable of serving end-user customers in all areas. This will provide certainty for new market entrants.[43]

Far from attempting to ascertain the availability of wholesale transport or presenting data for wire centers meeting the Commission's "three collocator" non-impairment test, the *Fact Report* instead presents Table 4, which purports to show the "Percentage of Wire Centers and Access Lines Served by One or More Fiber-Based CLEC Collocation Nodes." Far from confirming non-impairment, this Table actually demonstrates that competitive transport is certainly not available in a large number of RBOC wire centers. For example, only 13% of Verizon wire centers in the 25 largest MSAs (presumably areas with the most competitive transport activity) contain even *one* CLEC fiber-based collocation. The figures presented by other RBOCs are no closer to meeting the Commission's standards, with SBC showing 15% of wire centers and

43. *TRO*, 18 FCC Rcd 17231, footnotes omitted.

BellSouth showing 20% of wire centers containing one or more collocations.[44] Overall, the *Fact Report* claims that 16% of RBOC wire centers contain at least one fiber-based collocation. It is reasonable to assume that the percentage of wire centers containing *three* fiber-based collocation arrangements is significantly smaller, but of course this key metric is nowhere to be found in the *Fact Report*.[45] In any event, whatever count of collocations may have existed prior to the announcement of the SBC/AT&T and Verizon/MCI mergers, the numbers of qualifying collocations has now clearly diminished.

29. The *UNE Fact Report* authors claim

> ... competing carriers have already obtained fiber-based collocation in 16 percent of Bell company wire centers, which contain 47 percent of total access lines and 55 percent of total business lines. More than half of all BOC wire centers with 5,000 or more *business* lines now have fiber-based collocation. *See* Table 17. It is therefore reasonable to conclude that other wire centers that meet this criterion could economically support competitive fiber as well.[46]

No support whatsoever is advanced for this giant leap from what is to what might be. Indeed, sworn testimony by executives at a number of CLECs – individuals that unlike the authors of the

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44. Data for Qwest contains only the seven largest MSA, resulting in a significantly lower number of total wire centers and higher percentage of collocation.

45. The source data provided in the *UNE Fact Report* is insufficient to make this determination.

46. *UNE Fact Report*, at III-28.

Fact Report have had first-hand experience with the economic considerations and business decisions associated with network construction – belie the *UNE Fact Report*'s "facts."[47]

30. In fact, this RBOC claim is belied by the *UNE Fact Report*'s own Table 17. There, the *Fact Report* indicates that only about 53% of wire centers meeting this "5000 business lines" criterion (56% for Verizon, 40% for SBC, and 70% for BellSouth) actually contain collocation by at least one CLEC,[48] and as with Table 4, it is reasonable to assume that, if the *UNE Fact Report's* authors had included wire centers with *three* competitive collocations, the percentage of wire centers with viable competitive transport would be significantly smaller.

31. It is also noteworthy that Table 17 of the *UNE Fact Report* (presenting "Fiber Based Collocation in Wire Centers with 5,000 or More Business Lines") does not provide the percentage of total business lines included in those wire centers with 5,000 or more business lines. In its Table 4, the *Fact Report* contains not only the percentage of wire centers containing fiber-based collocation, but also the percentage of business lines and access lines served by those wire centers. These figures (55% of all business lines and 47% of total lines) are repeated

47. See, generally, *Tirado (XO)*; *Falveny (Xspedius)*; *Kunde (Eschelon)*; *Sommi (Broadview)*; *Brasselle (Talk America)*; *Abate (SNiP LiNK)*; *Duke (KMC)*; *Wigger (Advanced)*.

48. Again, the data for Qwest contains only the seven largest MSAs, resulting in a significantly lower number of total wire centers and higher percentage of collocation. Though not noted, it can be assumed that, as with Table 4, the *UNE Fact Report's* authors only included wire centers in the 25 largest MSAs.

several times in the *Fact Report*'s text.[49] Table 17, containing data based upon the *Fact Report's* proposed standard of wire centers with 5,000 or more business lines, contains no such corollary figures, nor can such figures be extracted based upon the data provided. Instead, Table 17 appears to include only the percentage of wire centers with *both* more than 5,000 lines *and* CLEC fiber-based collocation.[50] This is not the relevant data the Commission needs to evaluate even under the *UNE Fact Report's* proposed 5,000 line standard. To evaluate impairment on the 5,000 business line per wire center level, the Commission would require, at a minimum, a business case showing that, for *all* wire centers with 5,000 or more business lines, competitive deployment by multiple (i.e., at least three) CLECs is economic. Given that, according to the *Fact Report*, not even one CLEC has chosen to collocate in nearly half of the wire centers the *Fact Report* indicates are addressable, the conclusion that such collocation is economically *possible* for *three* CLECs cannot withstand scrutiny.

32. In contrast to ILEC networks, the architecture of CLEC networks consist of interoffice transport facilities used *solely* to *extend subscriber loops* from the RBOC wire center associated

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49. *UNE Fact Report*, at III-7, III-29, III-31.

50. The exact contents of Table 17 are unclear, since the column heading explains that it contains the, "Percentage of Wire Centers with 5,000 or More Business Lines and Access Lines Served by These Wire Centers with One ore More Fiber-Based CLEC Collocation Nodes," yet the table contains only two columns, "# of Wire Centers" and "% of All WCs." Though unclear, I have assumed that the "# of Wire Centers" Column contains the number of wire centers with 5,000 or more business lines in the top 25 MSA (7 for Qwest) and the "% of All WCs" column contains the percentage of all wire centers in the 25 MSA (7 for Qwest) with 5,000 or more lines and CLEC Collocation Nodes. The Table does not appear to contain any percentages based upon access lines.

with the customer's premises to a point on the CLEC's network where connectivity can be efficiently achieved. As confirmed in the sworn testimony of a number of CLEC declarants described above, as well as in the October 4, 2004 declaration of AT&T witnesses Fea and Giovannucci in WC 04-313, CLEC networks do not require or provide point-to-point connectivity between individual pairs of ILEC wire centers, and as such no inference can be drawn that such transport using CLEC facilities is "possible" merely because a particular CLEC – or multiple CLECs – happen to maintain collocations at the wire centers in question.[51] Other than reiterating this same unsupported speculation as to what CLECs can "possibly" do with facilities in place, the *Fact Report* itself offers no "facts" that bear on this subject at all.

51. *Kunde (Eschelon)*, at para. 10; *Abate (SNiP LiNK)*, at paras. 11-12; *Tirado (XO)*, at para. 38.

SPECIAL ACCESS PRICE TRENDS

The RBOCs' contention that special access prices have decreased since the onset of pricing flexibility rests upon contrived and misleading "analyses" that substitute "average revenue" for actual prices.

33. Verizon, BellSouth and SBC have each introduced evidence purporting to support their claim that RBOC prices for special access services have decreased since the onset of special access pricing flexibility, and use that "evidence" to decry the need for any additional regulation or price caps, including imposition of an "X" factor.[52] In fact, however, *prices* for RBOC special access services – and particularly for the least competitive DS-n services – when compared on an "apples-to-apples" basis – have *increased*, in some cases by high double-digit percentages since the pricing flexibility "triggers" had been satisfied. This fact is amply documented in the comments of numerous parties in this proceeding.[53] However, even in those instances where the nominal price has remained unchanged, it is still higher than the currently effective price for the

52. *BellSouth Initial Comments* at 13-23; *Verizon Initial Comments* at 5-8; Declaration of William E. Taylor on Behalf of Verizon, WC Docket No. 05-25, June 13, 2005 ("*Taylor WC 05-25, (Verizon)*") at paras. 13-45, *SBC Initial Comments* at 21-22, Declaration of Parley Casto on Behalf of SBC, WC Docket No. 05-25, June 13, 2005 ("*Casto WC 05-25, (Verizon)*") at para 54; Declaration of John C. Klick and Michael R. Baranowski on Behalf of SBC, WC Docket No. 05-25, June 13, 2005 ("*Klick and Baranowski WC 05-25, (Verizon)*") at para 51.

53. *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of the Ad Hoc Telecommunications Users Committee, filed June 13, 2005; "Competition in Access Markets: Reality or Illusion. A Proposal for Regulating Uncertain Markets ," Economics and Technology, Inc. (August 2004); *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of Sprint Corp, filed June 13, 2005.

same service provided by the same RBOC in non-pricing flexibility areas in which price cap rate adjustments are still required.

34. In claiming that special access prices have declined, Verizon, BellSouth and SBC rely upon broad averages and surrogates that *conceal*, rather than reflect, specific prices and price movements over the time period under examination. The RBOCs have been pushing this flawed data on regulators, in various iterations, for more than a year now. Dr. William E. Taylor, testifying initially for Verizon in WC 04-313, presented a contrived "analysis" that purported to show that special access prices have *decreased* under pricing flexibility.[54] Significantly, however, Dr. Taylor did not look at "prices" at all, focusing instead upon a surrogate – *average revenue per voice-grade equivalent (DS0) channel*. Changes in "average revenue per voice-grade equivalent ("VGE") channel" result from numerous factors – most notably changes in the *mix* of services actually being purchased – and it is not a valid indicator of "price."[55] In that same proceeding, SBC declarant Parley Casto testified that SBC's DS-1 special access rates had decreased by 11% since 2001, but conveniently ignored the fact that most of that apparent price

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54. *See*, Declaration of William E. Taylor Regarding Special Access Pricing on Behalf of Verizon, WC Docket No. 04-313, October 4, 2004 ("*Taylor WC 04-313 (Verizon)*"). *See also, Taylor WC 05-25, (Verizon)*.

55. The *Taylor WC Docket No. 04-313 (Verizon)* testimony updated an earlier analysis by Kahn and Taylor submitted in the Commission's Special Access proceeding. Dr. Kahn, however, in testimony presented before the US Court of Appeals, refuted the validity of exactly this type of fixed weight average as presenting misleading results. See, Association of Oil Pipe Lines v. Federal Energy Regulatory Commission and the United State of America, 281F.3d 239, 243; 350 U.S.App.D.C. 132, 136. The newest Taylor analysis filed in this proceeding updates that data yet again.

drop resulted from mandatory annual rate reductions required by the Commission's price cap rules for services not subject to pricing flexibility.[56] It is noteworthy that although they both offer "average revenue" data once again, neither Verizon nor SBC has offered any *direct* comparisons of specific price movements over time, since had they done so the results would have put a lie to the RBOCs' claims that prices have been falling. BellSouth does proffer limited actual pricing analysis that documents that prices for DS-1 and DS-3 services in pricing flexibility areas have either remained constant or increased (in the case of month to month prices) since 2001. BellSouth's poorly labeled Tables in Attachment 1, however, fail to identify the fact that the prices in those tables are only for pricing flexibility services. While the price on the printed pricing flexibility tariff page may not have increased since 2001 for many elements, the prices being paid for actual individual special access circuits did increase for customers quite regularly as additional areas were granted pricing flexibility status. Each time an additional MSA was granted Phase II status, the lower non-pricing flexibility prices (omitted from BellSouth's tables) were replaced on customers' bills with the higher pricing flexibility prices.

Flaws in Dr. Taylor's "average revenue" analyses

35. As discussed above, the Taylor pricing analysis filed as part of Verizon's initial comments in this proceeding update earlier Taylor work. In order to understand all of the infirmities of Dr. Taylor's technique, it is best to start with his earlier analyses. In WC Docket

56. Declaration of Parley C. Casto on Behalf of SBC Communications, Inc., WC Docket No. 04-313, October 4, 2004 ("*Casto WC 04-313(SBC)*").

No. 04-313, Taylor filed an analysis designed to demonstrate that the average price for special access services had declined by 15.5%.[57] As a surrogate for "price" Taylor developed an average revenue per VGE (which, unfortunately, does not even remotely approach being an adequate surrogate for "price"). In analyzing Dr. Taylor's "evidence," I became aware that the decreases that Taylor was documenting were less than what would have been required under the FCC price caps plan at the time. In fact, Verizon, BellSouth and SBC have all commingled price movements that were *required* under the Commission's price cap rules with RBOC-initiated price changes made following the onset of pricing flexibility. This was true in the initial filings made in WC 04-313 and RM-10593, and it remains true in the new filings in the instant proceeding as well.

36. A shown in Table 1 below, had the Commission's GDP-PI – 6.5% annual price cap rate adjustment rule been in effect for all special access services and for the periods since 1996 - 2003 (the period of Taylor's analysis) the "average" price decrease over the period would have been 28.5%, i.e., roughly *double* the 15.5% drop that Dr. Taylor had calculated in the analysis he proffered in WC-04-313.

57. Declaration of William E. Taylor Regarding Special Access Pricing on Behalf of Verizon, WC Docket No. 04-313, October 4, 2004 ("*Taylor WC 04-313(Verizon)*").